

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BRANDON E. DOUGLASS,

Plaintiff,

vs.

MATT JOHNSON,

Defendant.

NO. CV-05-5112-CI

REPORT AND RECOMMENDATION TO  
DISMISS COMPLAINT WITHOUT  
PREJUDICE AND TO DENY *IN FORMA*  
*PAUPERIS* STATUS FOR PURPOSES OF  
EXHAUSTING AVAILABLE  
ADMINISTRATIVE REMEDIES

Plaintiff, formerly a prisoner housed at the Washington State Penitentiary, now residing in Alaska, brings this *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff seeks monetary damages for an alleged assault occurring on October 26, 2005. Plaintiff affirms he has not completed the grievance process. He requests leave to proceed *in forma pauperis*.

**EXHAUSTION REQUIREMENT**

A prisoner may not bring any suit with respect to prison conditions "until such administrative remedies as are available are exhausted" (42 U.S.C. § 1997e(a)). The United States Supreme Court has held in *Booth v. Churner*, 532 U.S. 731, 741 (2001), that an inmate is required to exhaust administrative remedies regardless of what form of relief they are seeking in their complaint. See also *Porter v. Nussle*, 534 U.S. 516, 532 (2002) ("holding the PLRA's exhaustion

1 requirement applies to all inmate suits about prison life, whether  
2 they involve general circumstances or particular episodes, and whether  
3 they allege excessive force or some other wrong." ).

4 Ordinarily, exhaustion is an affirmative defense which must be  
5 raised by defendants. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.  
6 2003). When a plaintiff concedes he has not exhausted, however, a  
7 district court may dismiss the prisoner case for failure to exhaust.  
8 Mr. Douglass indicates the events contained in his complaint occurred  
9 within a month of the date he signed it, and he admits the grievance  
10 process is not complete. Therefore, his complaint is subject to  
11 dismissal for failure to exhaust.

12 **IT IS RECOMMENDED** this Complaint be **DISMISSED** without prejudice  
13 to Plaintiff filing a new action after he has exhausted available  
14 administrative. **IT IS FURTHER RECOMMENDED** the application to proceed  
15 *in forma pauperis* be **DENIED** to preserve Plaintiff from incurring  
16 multiple filing fee obligations.

17 Plaintiff is free to renew his efforts to file a civil action  
18 once all administrative remedies are exhausted. Plaintiff should be  
19 mindful of the three year statute of limitations *RK Ventures, Inc. v.*  
20 *City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002).

#### 21 **OBJECTIONS**

22 Any party may object to a magistrate judge's proposed findings,  
23 recommendations or report within ten (10) days following service with  
24 a copy thereof. Such party shall file with the District Court  
25 Executive all written objections, specifically identifying the  
26 portions to which objection is being made, and the basis therefor.  
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1 Attention is directed to Fed. R. Civ. P. 6(e), which adds another  
2 three (3) days from the date of mailing if service is by mail.

3 A district judge will make a *de novo* determination of those  
4 portions to which objection is made and may accept, reject, or modify  
5 the magistrate judge's determination. The district judge need not  
6 conduct a new hearing or hear arguments and may consider the  
7 magistrate judge's record and make an independent determination  
8 thereon. The district judge may also receive further evidence or  
9 recommit the matter to the magistrate judge with instructions. See 28  
10 U.S.C. § 636(b)(1)(B) and (C), Fed. R. Civ. P. 73, and LMR 4, Local  
11 Rules for the Eastern District of Washington. A magistrate judge's  
12 recommendation cannot be appealed to a court of appeals; only the  
13 district judge's order or judgment can be appealed.

14 **IT IS SO RECOMMENDED.** The District Court Executive is directed  
15 to enter this Report and Recommendation and forward a copy to  
16 Plaintiff.

17 DATED December 30, 2005.

18  
19 S/ CYNTHIA IMBROGNO  
20 UNITED STATES MAGISTRATE JUDGE  
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